89-1763

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1989

BRENDA CORNWELL,

Petitioner,

v.

GARY CRAWFORD and CITY OF RIVERSIDE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it contrary to the purposes of the Civil Rights Act of 1871, 42 U.S.C. 1983 (1982), to permit a prevailing civil rights plaintiff to be compelled to accept payment of punitive damages assessed against a police officer defendant from the municipality who employs the officer, when a state statute permits its municipality to pay such damages?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brenda Cornwell petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-6a) is reported at 896 F. 2d 398. On April 16, 1990, the

[1] Parties below who have no interest in this proceeding are: plaintiff, Fetus Cornwell; defendants, Carmen Andrade, Benjamin Reiser, Jackie Bell, and Richard Bradley.

Court of Appeals denied petitioner's request for rehearing with suggestion for rehearing *en banc*. (App. B) The district court order is at App. C.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1990. F.R. App. P. (West 1990) Rule 36. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 1 of the Ku Klux Klan Act of April 20, 1871, as amended, 42 U.S.C. 1983(1982), provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Government Code (West 1990) Section 825(b) provides, in pertinent part, as follows:

> Notwithstanding . . . any other provision of law, a public entity, other than the state . . . is authorized to pay that part of a judgment that is for punitive damages if the governing body of that public entity, acting in its sole discretion, finds all of the following . . . . [The judgment is against an employee who acted within the

course and scope of employment and in good faith, without actual malice, and in the apparent best interests of the public entity.]

STATEMENT

On April 4, 1986, petitioner, who was three months pregnant, was at her home on Cover Street, in Riverside, California. Two of the five Riverside police officer defendants were trying to gain admittance to a party at the home next door to petitioner's home for the alleged purpose of detecting evidence of underage persons consuming alcoholic beverages. These two "undercover" officers were not in uniform, got into a dispute with a partygoer, and that dispute spilled over into petitioner's front yard.

Petitioner who was watching television with her spouse and two minor children, went outside to ask the two officers and the partygoer to leave her yard and to stop making noise. The officers, who did not identify themselves, ignored petitioner's request. Petitioner then went into the house next door to request that her neighbors ask their partygoers to leave petitioner's front yard; but, by the time she exited the neighbor's home, petitioner's spouse had been arrested for attempting to convince the officers to leave petitioner's front yard, and was laying face-down on the ground in petitioner's front yard.

The other police defendants had, by this time, arrived, and as petitioner exited her neighbor's home, petitioner witnessed numerous officers near her home, and one officer in the doorway to her home. Petitioner feared for the safety of her two minor children who had been left inside her home, and ran toward her door. There, she was met by an officer who forcefully struck her in her (pregnant) stomach.

Petitioner was taken into police custody and transported to a nearby hospital where respondent Crawford forced her to submit to his taking a photograph of her abdomen from the top of her pubis to the bottom of her breasts, for the stated purpose of gathering evidence that petitioner's pregnant stomach had not been injured by the blow she received from the other officer at the door to her home.

On May 2, 1988, the jury returned its verdicts in favor of petitioner, and against the police officers and awarded damages as follows: (1) against the officer who punched petitioner in the stomach, $25,000 compensatory damages, and $75,000 punitive damages; (2) against the two officers who took petitioner into custody, each $2,000 compensatory damages, and $8,000 punitive damages; (3) against the supervising sergeant at the scene who approved the other officers' conduct, $50,229.97 compensatory damages, and $200,000 punitive damages; and, (4) against respondent who photographed petitioner, $10,000 compensatory damages, and $40,000 punitive damages.

On defendants' motion for a remittur, the district court reduced the total $327,000 punitive damages award to $45,000 by reducing the award against the officer who punched petitioner from $75,000 to $15,000; against the two arresting officers from $8,000 to $500 each; against the supervising officer from $200,000 to $25,000; and against respondent who photographed petitioner from $10,000 to $4,000.

In ordering the remittur, which petitioner accepted, the district court had the following to say about the defendants' conduct:

> In this case, there was ample evidence from which the jury could determine that the plaintiff was unnecessarily and brutally hit in the stomach while she was pregnant, and at a time when she simply was proceeding toward her own home for the purpose of protecting her children. [W]hat we are dealing with is the deprivation of important constitutional rights, and the imposition of a physically injurious and extremely humiliating set of actions . . . . The violation of civil rights is no minor matter, for it can shake one's confidence in the stability of rights in our society . . . . [T]he acts of the officers were wrong and seriously so . . . . the purpose here is to send a message to the officers and others like them.

Of the individual officers' conduct the court had this to say:

> [The punching officer's] actions and what the jury must have found to have been his untruthfulness about them [indicate] that it is most important that [he] be sent a strong message about the consequences of such activity [hitting a pregnant woman in the stomach] to preclude him from so behaving toward citizens in the future.
>
> [The two arresting officers m]ust be remind[ed] their primary obligation is to the Constitution rather than their superiors, and deter[red] . . . from further violation . . . ."
>
> [The supervising sergeant] was in charge . . . . [H]e surely could have done a great deal to prevent the ultimate injury . . . by firmly stepping in and preventing any further invasion of rights. Instead, he stood by and adopted [the punching officer's] actions, allowed and encouraged more invasions . . . and bears responsibility for [the] arrest and the ultimate photography session [in which petitioner's

> pregnant stomach and pubis were photographed against her will]. [What he permitted] strip[ped] plaintiff of her standing as a citizen and individual, and [he] must bear responsibility for that serious . . . situation. [T]he jury most likely also found [he] was untruthful on the witness stand, and that a strong message was necessary for the purpose of precluding improper activities by him in the future.
>
> [Respondent who photographed plaintiff must know h]is actions were oppressive and improper . . . . [He] even took steps to make [the photographs] cover a larger area than they otherwise would have [covered, including plaintiff's pubis and breasts]. [He must be deter[red from] further conduct of th[is] nature and . . . punish[ed] . . . for what he did.

The City of Riverside then, pursuant to California Government Code Section 825(b), made the requisite findings and decided to indemnify the officers' punitive damages. Petitioner refused to accept payment of the punitive damages from the City, and began execution of judgment against the individual officers.

Eventually, the district court stayed execution pending the outcome of the resolution on appeal of the issue presented in this Petition. While the appeal was pending, petitioner reached a settlement with all defendants, except respondent officer Crawford (the photographer).

The Court of Appeals affirmed the district court's decision that once the City tendered the punitive damages to petitioner, petitioner could not attempt to execute on those damages against the individual officers.

REASONS FOR GRANTING THE PETITION

There are at least three reasons for granting this Petition:

1. There has been a faulty construction of federal law, in which a state statute has been permitted to override the clear purposes of federal law, and this anamoly will affect numerous civil rights cases;

2. Public officials have used methods which are alien to our American system of justice, and are being permitted to escape the consequences of their unsavory conduct; and,

3. The opinion below is at odds with previous assumptions, and will operate to cause serious unwanted and unwarranted results.

It is completely contrary to the recognized purpose of the civil rights laws and the purpose for the assessment of punitive damages to permit a local governmental entity to pay punitive damages assessed against its police officers. The allowance of such indemnification in the face of an objection from a creditor of such damages who insists on enforcing the deterrent function of the civil rights laws is both wrong and contrary to settled principle and law.

> Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. Liability for . . . injurious conduct [is] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen v. City of Independence, 445 U.S. 622, 651-52 (1980). The district court's and Appeals Court's decisions run contrary to the deterrent purpose of Section 1983.

> The purpose of punitive damages is very clear:
>
> > to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 85.11. This instruction was given to the jury in the trial of this case.

In the context of refusing to permit a civil rights plaintiff to recover punitive damages from a local government over the objection of that government, this Court made very clear the purposes that underlie punitive damages in federal civil rights actions.

> [T]he 1871 [Civil Rights] Act was designed to expose state and local officials to a new form of liability [and it] would defeat the promise of the statute to recognize any preexisting immunity without determining both the policies that it serves and its compatibility with the purposes of Section 1983. [Citations omitted.] Only after careful inquiry into considerations of both history and policy has the Court construed Section 1983 to incorporate a particular immunity defense.[2] [T]he officials' malice [for purposes of

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[2] Indeed, only those immunities that historically existed at the time the Civil Rights Act became law in 1871 have been applied by the Courts as immunities in Section 1983 actions, and it long has been the case that "[s]tate statutory immunity provisions do not apply to federal civil rights actions." *Guillory*

(Continued on following page)

> punitive damages] should not be attributed to the taxpaying citizens of the community . . . . "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent."
>
> . . .
>
> ("The [municipal] corporation can not, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs"). In general, courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. . . . Compensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to the actual wrongdoers. The courts thus protected the public from unjust punishment . . . . [262-64.] [W]e examine the objectives underlying punitive damages in general, and their relationship to the goals of Section 1983. Punitive damages by definition are not intended to

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(Continued from previous page)

v. County of Orange, 731 F. 2d 1379, 1382 (9th Cir. 1984). As this Court has held, to construe a federal statute to allow a state immunity "to have controlling effect would transmute a basic guarantee into an illusory promise," which the Supremacy Clause does not permit. *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980). In *Guillory*, the Ninth Circuit refused to permit California to set up California Government Code Sections (820.2 and 821.2) as immunity defenses in a civil rights action. 731 F. 2d at 1382. The holding in *Guillory* should have dictated a different result by the Ninth Circuit in the instant case, as should have this Court's *Martinez* decision.

compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct . . . . [I]t remains true that an award of punitive damages against a municipality "punishes" only taxpayers, who took no part in the commission of the tort. [266-67.]

[The] retribution should [not] be visited upon the shoulders of blameless or unknowing taxpayers. Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct . . . . Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.

. . .

[D]eterrence of future abuses of power by persons acting under color of state law is an important purpose of Section 1983 . . . . [T]he deterrence rationale of Section 1983 does not justify making punitive damages available against municipalities. [268-69.] [T]here is a more effective means of deterrence [than assessing punitive damages against governmental entities]. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations . . . . The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a governmental employer. [Citation omitted.] We see no reason to depart from that conclusion

> here, especially since the imposition of additional penalties would most likely fall upon the citizen-taxpayer.
>
> To add the burden of exposure for malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities. [270-71.]

City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 266-71 (1981).

This Court unequivocally has declared that the malice of individual government officials "should not be attributed to the taxpaying citizens of the community" and that a municipality cannot "be responsible for the malice of its officers." "Punishment properly [can be] applied only to the actual wrongdoers." "Retribution should [not] be visited upon the shoulders of blameless or unknowing taxpayers."

Yet, the State of California has attempted to accomplish precisely what the United States Supreme Court has forbidden: an attribution to the taxpaying citizens of the community of the malice of government officials. While the State has the power to regulate attribution of punitive damages in *its* courts, it has no power whatever to permit payment of punitive damages by its local governmental entities when such damages are assessed in a federal court. United States Constitution, article VI (the Supremacy Clause). Apart from the federal constitutional block to such state permissiveness, the purposes of assessment of punitive damages in civil rights actions do not permit such burden-shifting. Moreover, traditional notions of punishment and responsibility do not permit the sort of burden-shifting permitted by the State.

In January 1986, California's new punitive damages burden-shifting law took effect. California Government Code (West 1990) Section 825(b). That Section permits governmental entities in California to pay judgments for punitive damages under certain prescribed circumstances by making findings that employees acted within the course and scope of their duties and acted in good faith. (Of course, such a finding of good faith would be completely at odds with any jury verdict in a federal civil rights action against government employees whom a jury necessarily would have found not to have been in good faith by its rendering of a verdict against such employees; not to mention it being completely at odds with the necessary mixed factual/legal finding predicate for an award of punitive damages: wantonness, malice, or oppression.)

The California statute may not have any effect whatsoever in this action. Section 1988 of volume 42 of the United States Code provides that:

> The jurisdiction in civil . . . . matters conferred on the district courts, by the provisions of this Title, . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, *so far as the same is not inconsistent* with the Constitution and laws of the United States, shall be extended to and govern said courts . . . .

(Emphasis added.) Section 1988's first sentence, *supra*, puts into effect the principle of assimilation of laws, but

limits the application of assimilation to be consistent with the mandate of the Supremacy Clause, *supra*. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof[ ] . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, and any thing in the Constitution or laws of any state to the contrary notwithstanding.") The assimilative provisions of Section 1988 can have no application in instances in which state law is incompatible with, or contrary to, federal law, *Robertson v. Wegmann*, 436 U.S. 584 (1978), as here. In considering questions of inconsistency between federal law and state law for the purposes of assimilative application of state law under Section 1988, the policies underlying federal law must be considered and put into effect; and state law may *not* be applied assimilatively when such application would be inconsistent with the principles underlying federal law. *Bell v. City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984). For example, it has been held that conflicting California state law concerning an award of attorneys' fees may *not* be applied when such California state law is inconsistent with federal law. Section 1988 preempts application of conflicting California law when it is inconsistent with federal law. *La Raza Unida v. Volpe*, 545 F. Supp. 36 (D. Cal. 1982).

The provisions of Government Code Section 825(b) are inconsistent with the federal common law of punitive damages, and therefore the provisions of that Section may not be invoked in this federal civil rights action to vouchsafe from the burden of punitive damages the malefactor police officer against whom the jury in this case

quite rightly assessed punitive damages with every expectation that the officer, and not the City of Riverside, would pay those damages.

"Title 42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is 'necessary to furnish suitable remedies' under § 1983." *Carey v. Piphus*, 435 U.S. 247, 258 n. 13 (1978). Federal courts are to turn to state law in order to fill gaps which may exist in federal law. *See Brazier v. Cherry*, 293 F. 2d 401, 409 (5th Cir. 1961). When federal law is sufficient to carry the *policies* of the civil rights statutes into effect, resort to state law is not necessary. *Ibid.* "Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U.S.C. § 1988 . . . ." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). *A fortiorari*, so too are punitive damages governed by federal standards when they are awarded for deprivation of *federal* right. "[R]esort to State law . . . should not be undertaken before principles of federal law are exhausted." *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). Here, principles of federal law are not exhausted, and need not be exhausted, because the principles underlying federal law require that those against whom punitive damages are assessed, must bear the burden of those damages. Federal law allows the imposition of punitive damages even in cases in which such recovery may not be had under state law. *Smith v. Wade*, 461 U.S. 30 (1983). *A fortiorari*, in cases in which state law attempts to make nugatory an award of punitive damages, *viz.*, California Government Code Section 825(b), federal law does not permit the assimilation of those state law provisions to thwart the impact of federal law.

It has been stated that a goal of assimilation of state law under Section 1988 is the achievement of uniformity of federal law. *Wilson, supra; Owens v. Okure,* 109 S. Ct. 573 (1989). It would be wholly inconsistent with the Supreme Court's view of the application of state law through Section 1988 to permit assimilation of California's Section 825(b) because California thereby would be permitted to have a *sui generis* rule that would permit its government officials to escape the burdens of their misconduct while government officials in other jurisdictions would have to bear that burden. It thus is inconsistent with the Supreme Court's view that there be uniformity of application of the civil rights laws to permit respondent here to shelter himself under Section 825(b).

The opinion below glibly, and based on reasons set forth therein that are admittedly wholly inconsistent with federal law, but consistent with the panel's author's antipathy to civil rights plaintiffs, brushes aside precedent and the admitted "harmony" between petitioner's position and the "[Supreme] Court's analysis of punitive damages[,]" 896 F. 2d at 400, to reach the results-oriented conclusion that state law may operate to vouchsafe from the imposition of punitive damages miscreant police officers so that civil rights "plaintiff[s] would [not] have an extraordinary weapon with which to negotiate with individual defendants [in civil rights actions]." *Ibid.* The opinion is significantly flawed, for the following reasons. (Each initial quotation from the opinion is followed directly with the reasons it is flawed.)

1. "There is no doubt that the damages awardable under 42 U.S.C. § 1983 are a matter of federal law. California cannot set up a policy subversive of that law.

. . . City of Newport does not establish a federal policy prohibiting a city from paying punitive damages . . . . [T]he city is not bound by the jury's findings . . . . " 896 F. 2d 398 at 399.

These statements are misguided. First, California's enactment of Government Code Section 825(b), which permits indemnification of punitive damages by California government entities *is* "subversive" of the federal law of punitive damages. That is so because it permits those against whom punitive damages have been assessed not to pay them; the damages are *punitive – to punish,* and surely this Court would hold that a California statute that permitted a governmental entity to designate one other than one convicted of a crime to serve jail time to be "subversive" of federal law, and would strike down such a statute very quickly. It is not the policy set forth in *City of Newport,* as the panel misleadingly claims, that is the policy in issue (and therefore, that *City of Newport* does not establish a policy), rather, the policy is the very federal law noted by the panel that "the wrongdoer himself [or herself] . . . is made to suffer for his [or her] unlawful conduct . . . . " 896 F. 2d at 399. Section 825(b) is "subversive" of this policy. While the City may not be bound by the jury's findings, the defendant against whom punitive damages are awarded should be. Petitioner here does not seek to bind the City; she seeks to bind the defendant. And, the Court has the power to bind the City in this case, *see, e.g.,* 28 U.S.C. 1651(a), because the City was a party.

2. "We find no federal law prohibiting California cities from acting under the authority conferred by the

California legislature. When Congress has wanted to prohibit payment of damages on behalf of one person by another it has known how to do so with express language." 896 F. 2d at 400. This, also, misses or avoids the point. Congress has not provided for punitive damages; the common law of damages has made that provision. Thus, to hold, as the panel did, that only congressional action may prevent indemnification of punitive damages by the government misses the point that Congress does not need to do so because the common law has done so. Indeed, Congress has not provided for innumerable matters that this Court regularly decides without the intervention of Congress that the panel in this case seems to feel is necessary.

3. "[A] prohibition on indemnification would be in harmony with the [Supreme] Court's analysis of punitive damages." *Ibid.* This statement should have warranted the relief sought, without more, because the common law, and not a federal statute, should control the outcome of this case.

4. "[That] there would be occasions when civil rights plaintiffs would go unsatisfied because the individual defendants lack the assets to pay [punitive damages,]" *ibid.*, misses the point because petitioner did not ask the court to *bar* indemnification of punitive damages; but simply, as the panel later divines, to permit a plaintiff who is awarded punitive damages, *to refuse to permit indemnification*. Such a plaintiff would be the only person with standing to do so, and if, in such a case that plaintiff went "unsatisfied," that would be his or her decision. The panel's "concern" here is unsupported *obiter dictum*.

5. The panel's refusal to follow the federal law of damages it admits is controlling in this case because to do so would give a civil rights plaintiff "an extraordinary weapon with which to negotiate with individual defendants[,]" *ibid.*, should be beside the point. The law should be the law, even if it is helpful to plaintiffs in civil rights cases. This is not "an additional remedy," *ibid.*, to civil rights plaintiffs – it is the law. Additionally, by enacting Section 825(b), California has arrogated to itself the power to provide "an additional defense" to civil rights defendants.[3] If, as the panel candidly admits, it does not wish, in any way, to assist civil rights plaintiffs, fairness dictates that a new defense met by a new remedy simply evens up what, prior to the enactment of Section 825(b), was a status quo.

The Court of Appeals rendered a faulty construction of the federal law of punitive damages. A State statute has been permitted to preempt federal law, and the anamoly created by this construction will affect every civil rights case in California. As the district court made abundantly clear, the public officials in this case used methods, and behaved in a manner completely alien to our American way of life, and the panel opinion permits respondent to escape the consequences intended by both federal law and by the jury. The panel opinion is wholly at odds with, and contrary to, previous assumptions concerning the federal law of punitive damages, and will result in serious, unwanted results.

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[3] *See* note 1, *supra*.

As this Court held the day before this Petition was completed, "[a] local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation." *Missouri v. Jenkins*, 88-1150 (April 18, 1990). *A fortiorari*, a local government with authority to indemnify its police for punitive damages assessed against the police, may be ordered, and should be ordered, not to pay punitive damages for respondent because there is reason based in federal law for prohibiting indemnification permitted by state law.

In *Pavelic & LeFlor v. Marvel*, 110 S. Ct. 456, 460 (1990), this Court put pay to the flawed reasoning of the Court of Appeals in this case by stating the following, which, *in haec verba*, ought to have been the ruling of the Court of Appeals in *this* case, and ought to be a part of this Court's holding in this case.

> [I]t is not at all clear that respondents' strained interpretation would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these* purposes are better served by a provision which makes clear that, just as the court expects the signer personally – and not his law firm – to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him

> personally – and not his law firm – its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone,* is precisely the point of Rule 11.

As is the case with Rule 11 sanctions, so too should it be the case with punitive damages that retribution should fall not on the taxpayers, but on the wrongdoer, because "[t]he message thereby conveyed [will be that the blame] is *yours alone. . . .*" To hold otherwise would make nugatory the purpose and effect of punitive damages.

The Petition for Certiorari should be granted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FETUS CORNWELL, *Plaintiff,* and BRENDA CORNWELL, *Plaintiff-Appellant,* v. CITY OF RIVERSIDE, *Defendant,* and CARMEN ANDRADE; GARY CRAWFORD; BENJAMIN REISER; JACKIE BELL; RICHARD BRADLEY, *Defendants-Appellees.*	No. 88-6593 D.C. No. CV-86-3107-FFF OPINION

Appeal from the United States District Court
for the Central District of California
Ferdinand F. Fernandez, District Judge, Presiding

Submitted January 12, 1990*
Pasadena, California

Filed February 15, 1990

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

Before: Richard H. Chambers, Jerome Farris and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Affirming the district court's order staying the collection of damages in a civil rights case, the court held that a successful 42 U.S.C. § 1983 plaintiff may not compel punitive damages payment to be made by individual defendants rather than by the city that employed them.

After appellant Brenda Cornwell brought a successful civil rights action against five appellee City of Riverside police officers, in addition to general damages, the jury awarded $45,000 in punitive damages. Under California law, a public entity other than the state is authorized to pay punitive damages awarded against its employees if it finds that the employees were acting within the course of their employment, in good faith, in the apparent best interests of the public entity, and payment would be in the best interests of the entity. When the City of Riverside offered to pay the punitive damages assessed against the officers, Cornwell refused to accept them. The district court stayed execution of the judgment against the individual officers until after a decision by the court on the appeal from the order.

[1] Based on quotation from *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981), Cornwell argued that there is a federal policy that forbids the payment of punitive damages by a municipality. [2] However, *City of*

Newport does not establish such a federal policy when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay. That the city reaches a different result as to the good faith of the officers than does a federal jury is not decisive. The city is not bound by the jury's findings when it makes its decision to indemnify.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiff-appellant.

John M. Porter, Roberts & Morgan, Riverside, California, for the defendants-appellees.

OPINION

NOONAN, Circuit Judge:

This appeal from an order of the district court staying the collection of damages in a civil rights case presents a new question of law: Can a plaintiff successful in an action under 42 U.S.C. § 1983 and awarded punitive damages by the jury compel their payment to be made by the individual defendants rather than by the city that employed them? We agree with the district court that there is no federal prohibition against the city paying the punitive damages.

FACTS

Brenda Cornwell brought a successful civil rights action against five police officers employed by the city of Riverside, California. In addition to general damages, the jury awarded punitive damages which, by remittitur, were reduced to a total of $45,000.

Under a California statute enacted in 1985 a public entity other than the state is authorized to pay punitive damages awarded against its employees if the public entity finds that the employees were acting within the course of their employment, in good faith and "in the apparent best interests of the public entity," and the payment would be "in the best interests of the public entity." Cal.Gov.Code § 825(b) (West Supp. 1986-1990). When the City of Riverside offered to pay the punitive damages assessed against the officers, Cornwell refused to accept them. The court then stayed execution of the judgment against the individual officers, the stay to be in effect until after a decision by this court on the appeal from the order.

ANALYSIS

[1] Cornwell has constructed an ingenious argument based largely on quotation from *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981). That case held that a city was immune from punitive damages under the Civil Rights Act. In the course of reaching this conclusion the Court pointed out that the malice of the city's employees "should not be attributed to the taxpaying citizens of the community." *Id.* at 261. It further noted that under the ordinary principles of retribution, "it is the

wrongdoer himself who is made to suffer for his unlawful conduct" and that an award of punitive damages against a municipality " 'punishes' only taxpayers, who took no part in the commission of the tort." *Id.* at 266-67. Developing these statements, Cornwell argues that there is a federal policy that forbids the payment of punitive damages by a municipality.

[2] There is no doubt that the damages awardable under 28 U.S.C. § 1983 are a matter of federal law. California cannot set up a policy subversive of that law. But *City of Newport* does not establish a federal policy prohibiting a city from paying punitive damages when the city finds its employees to have acted without malice and when the city deems it in its own best interest to pay. That the city reaches a different result as to the good faith of the officers than a federal jury is not decisive: the city is not bound by the jury's findings when it makes its decision to indemnify.

An analogous case is whether public policy should prohibit insurance coverage of punitive damages in civil rights actions brought against municipal officers. A number of courts have held that absent specific legislation such coverage does not violate public policy. 1 J. Ghiardi & J. Kircher, *Punitive Damages* § 7.12 (1985). We find no federal law prohibiting California cities from acting under the authority conferred by the California legislature. When Congress has wanted to prohibit payment of damages on behalf of one person by another it has known how to do so with express language. *See* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(g)(3) (corporation may not pay fine of its officers penalized under the act). Congress has enacted no such provision here.

What the Supreme Court has said in *City of Newport* is not addressed to the exercise of the authority conferred by the California legislature. It is well argued on behalf of Cornwell that a prohibition on indemnification would be in harmony with the Court's analysis of punitive damages. Such a result, however, is not compelled by what the Court has said. When the city decides that it is in its best interest to pay, the taxpayers have decided through their representatives that it is to their benefit as taxpayers to help out the officers. As Judge Fernandez pointed out in the trial court, there is still a substantial sting to punitive damages awarded against the individuals.

If § 1983 were construed to prohibit a municipality from paying punitive damages, there would be occasions when civil rights plaintiffs would go unsatisfied because the individual defendants lack the assets to pay. If § 1983 were construed to mean that the successful plaintiff had the option to accept or reject punitive damages that the municipality was paying on behalf of employees, the plaintiff would have an extraordinary weapon with which to negotiate with individual defendants. We do not believe we should add an additional remedy to those already provided the civil rights plaintiff.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FETUS CORNWELL, Plaintiff, and BRENDA CORNWELL, Plaintiff-Appellant, vs. CITY OF RIVERSIDE, Defendant, and CARMEN ANDRADE; GARY CRAWFORD; BENJAMIN RISER; JACKIE BELL; RICHARD BRADLEY, Defendants-Appellees.	No. 88-6593 DC# CV-86-3107-FFF ORDER (Filed April 16, 1990)

Before: CHAMBERS, FARRIS and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Farris and Noonan have rejected the suggestion for rehearing en banc and Judge Chambers so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appellees' Circuit Rule 27-3 Certificate Emergency Motion of March 30, 1990 is denied as moot.

APPENDIX C

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FETUS CORNWELL and BRENDA CORNWELL, Plaintiffs, v. CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD, and BENJAMIN REISER, Defendants.	Case No. CV 86-3107 FFF (Gx) ORDER ON PLAINTIFF'S MOTION FOR ORDER THAT CITY OF RIVERSIDE PAY COMPENSATORY DAMAGES AND DEFENDANTS' MOTION FOR ORDER CONFIRMING SATISFACTION OF JUDGMENT (Filed Oct. 7, 1988)

The above entitled matter came on regularly for hearing on September 26, 1988. Stephen Yagman, Esq. of Yagman & Yagman appeared on behalf of plaintiff; and John M. Porter, Esq. of Roberts & Morgan and Richard R. Terzian, Esq. of Adams, Duque & Hazeltine appeared on behalf of defendants. The Court, having reviewed the written briefs submitted by the parties, and having considered oral argument, rules as follows:

IT IS HEREBY ORDERED that defendants CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD, and BENJAMIN REISER (or the City of Riverside or anyone else) shall pay the compensatory damages portion of the judgment in this matter on or before October 11, 1988. Interest on the compensatory damages portion of the judgment will cease to accrue upon such tender. Tender may be made by check from the City of Riverside, or anyone else, for all defendants. If the compensatory damages are not paid on or before October 11, 1988, plaintiff may seek execution of that part of the judgment only against the individual defendants. Plaintiff may not seek execution of the compensatory damages portion of the judgment from the City of Riverside.

IT IS FURTHER ORDERED that plaintiff, BRENDA CORNWELL, is directed to accept the separately-tendered payment of the punitive damages portion of the judgment on or before October 11, 1988 from defendants CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD and BENJAMIN REISER (or from the City of Riverside or anyone else). Tender of this portion of the judgment may also be made by check from the City of Riverside, or anyone else, for all defendants. If plaintiff refuses to accept the punitive damages

portion of the judgment after tender, a stay of execution shall take effect automatically, as described in the following paragraph;

IT IS FURTHER ORDERED that if plaintiff, BRENDA CORNWELL, refuses to accept the punitive damages portion of the judgment after tender, that a STAY OF EXECUTION shall take effect immediately and automatically, and plaintiff, BRENDA CORNWELL, and her counsel, are prohibited from enforcing or attempting to enforce the punitive damages portion of the judgment or from instituting any related proceedings to enforce the punitive damages portion of the judgment. This STAY OF EXECUTION precludes plaintiff and her counsel from taking any steps whatsoever to execute on the punitive damages portion of the judgment, including, by way of example, but not limited to, discovery proceedings against the individual defendants, the filing or recordation of abstracts of judgment in any jurisdiction, or other efforts to cloud title or assert a lien against the assets and property of defendants, or other efforts to collect the punitive damages portion of the judgment from the individual defendants. Said STAY OF EXECUTION shall remain in full force and effect until a date ten days after issuance of the mandate by the United States Court of Appeals for the Ninth Circuit or until further order of this Court, whichever occurs first;

IT IS FURTHER ORDERED that interest on the punitive damages portion of the judgment shall cease to accrue upon tender of payment. Should plaintiff prevail on an appeal of the question of the ability of the City of Riverside or any other person to pay the punitive damages portion of the judgment, interest will continue to

accrue until such a ruling has been entered by the United States Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that the "'First Amended' Undertaking on Appeal and Stay of Execution" filed May 24, 1988 and entered on May 26, 1988 is released and cancelled, and shall be withdrawn from the Court file and returned to the bonding company through counsel for defendants herein. No further bond or other undertaking shall be required from any defendant.

DATED: Oct. 7, 1988

/s/ Ferdinand F. Fernandez
FERDINAND F. FERNANDEZ
United States District Judge

Presented By:

ROBERTS & MORGAN
JOHN M. PORTER
and
ADAMS, DUQUE & HAZELTINE
RICHARD R. TERZIAN
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By /s/ Richard R. Terzian
Richard R. Terzian
Attorneys for Defendants

DATED: September 28, 1988

Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1763

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1989

BRENDA CORNWELL,

Petitioner,

v.

GARY CRAWFORD AND CITY OF RIVERSIDE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

RESPONDENTS' STATEMENT OF QUESTION PRESENTED

Whether the indemnity provision of California Government Code Section 825(b) conflicts with and is preempted by federal common law or policy, such that the City of Riverside is precluded from paying a punitive damages award issued against one of its police officers as permitted by Section 825(b).

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NO. 89-1763

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1989

BRENDA CORNWELL,

Petitioner,

v.

GARY CRAWFORD AND CITY OF RIVERSIDE,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents City of Riverside and Gary Crawford respectfully request that this Court deny the petition for writ of certiorari that seeks review of the Ninth Circuit's opinion in this case.

I.

OPINIONS BELOW

The order of United States District Court Judge Ferdinand F. Fernandez of the Central District filed July 22, 1988 is attached hereto as Appendix A to Respondents' Brief in Opposition, inasmuch as it was not included in the Appendix to the Petition.

II.

STATUTES INVOLVED

Because Petitioner omitted certain portions of California Government Code Section 825 from her Petition, and because Respondents believe that a more accurate view of the relationship between Section 825 and 42 U.S.C. Section 1983 is obtained by reading the entire California statute, it is set forth verbatim as Appendix B to this Brief in Opposition.

III.

STATEMENT OF THE CASE

This Petition concerns the sum of $4,000, and whether that sum can be paid by Respondent City of Riverside (hereinafter "City" or "Respondent") pursuant to California Government Code Section 825(b), or must be paid by Respondent Gary Crawford (hereinafter "Crawford" or "Respondent"), a Riverside police officer, out of his own pocket.

The City and Crawford disagree with the Petitioner's characterization of the incident which gave rise to the judgment in this case (see Petition, pp.3-4), but nevertheless submit that the underlying incident is not directly relevant to the question presented by the Petition. The City and Crawford do not dispute the fact that a judgment for compensatory and punitive damages was issued against Crawford as well

as several other Riverside police officers. Indeed, the City and Crawford have been attempting to satisfy that judgment since June of 1988. Respondents respectfully submit that what is relevant to the question presented by the Petition is the background surrounding Respondents' efforts to satisfy the judgment, and Petitioner's and her counsel's conduct in connection therewith.

After the jury returned its verdict in this case against Crawford and four other Riverside officers[1/] for a total of $415,229.97, Petitioner, through her counsel, Mr. Stephen Yagman, proposed a settlement of the litigation whereby the City, (not the individually named defendants) would pay the full judgment, plus attorneys' fees, within one week. Mr. Yagman threatened that if the

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1/ Carmen Andrade, Jackie Bell, Richard Bradley, and Benjamin Reiser. (Prior to the trial Petitioner dismissed, on her own motion, the City of Riverside, the Mayor and members of the City Council, as well as the Chief of Police and police officers Steve Shumway and John Start.)

settlement offer was not accepted, Petitioner would "never settle [the] case in a way that [would relieve] the individual officers" from paying the punitive damages award themselves.[2/]

On May 20, 1988 the defendants filed a motion for judgment notwithstanding the verdict and for a new trial.

Thereafter, more settlement negotiations were held between counsel. In a letter dated June 1, 1988, Mr. Yagman again offered to allow the City to pay the full judgment, including the punitive damages, at an increased amount of $525,000; but if not, Petitioner would then attach and seize the property of the individual police officers

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[2/] Supplemental Excerpts of Record, pp. 18-19, 22-24 (hereinafter referred to as "Supp. R. ___"). Citations to the Excerpts of Record shall be referred to as "R. ___". Respondents have cited to the record below in places where they consider such citation important, even though the record is not now before the Court.

and garnish their wages "for the rest of their lives, if necessary." (Supp. R. 23-24.) At one point, Mr. Yagman even demanded that the City pay all of the damages in cash dollars, not by check, because he and his client did not consider the checks to constitute "legal tender." (Supp. R. 19-20, 31.)

On June 27, 1988, United States District Judge Ferdinand F. Fernandez signed and filed an "Order Regarding Motion for Judgment Notwithstanding the Verdict and for New Trial." He denied the motion for judgment notwithstanding the verdict, but conditionally granted a motion for new trial unless Petitioner accepted a remittitur of the total punitive damages award from $327,000 to $45,000.

On July 1, 1988 Petitioner filed her "Notice of Acceptance of Remittitur." (R. 20 (item 76).)

Thereafter, however, Petitioner filed a "Notice of Motion and Motion for Reconsideration of the Court's Order of Remittitur on Amount of Punitive Damages, Etc." Petitioner's counsel asserted that, inasmuch as it is "apparent that the City will pay the punitive damages," Judge Fernandez should reinstate the original judgment because, at the time he issued the remittitur, he was not aware that the City intended to pay the punitive damages portion of the award. (Supp. R. 9-11.)

Judge Fernandez denied the motion in a written order filed July 22, 1988. He first pointed out that no evidence was admitted regarding the assets of the individual defendants. He then went on to observe:

> "The Court was, and is, of the opinion that [a judgment for punitive damages] levied against the

officers personally would not only underscore the impropriety of their actions for them, but would also be a standing warning to all others regarding such actions.

"The Court does not accept the plaintiff's major premise that the award here loses most of its value if the officer does not pay it.

"First, the same could be said about compensatory damage awards, particularly when there is insurance. However, those of us who are involved in the legal system know that ordinary people feel very strongly about being accused of wrongdoing and found responsible for others' injuries, even when there is insurance to cover the damages awarded.

"Secondly, the award is against the individuals and they have no right to be paid by the City or anyone else, and that must be, and remain, a concern of theirs. California Government Code Section 825(b) does not require payment by the City. Rather, the governing body must make a decision regarding the particular case before payment is authorized.

"Third, it can be expected that no public entity likes paying out money, and police officers, and others, must be aware of that fact, and must be aware of the possible political repercussions of authorizing the payment of punitive damage awards." (App. A. infra, 1a-2a.)

Judge Fernandez concluded:

> "In any event, the Court does not believe that it should be concerned about where the defendants ultimately obtain the money to pay any awards against them, be it from their own assets, from a relative, from an association, from a fund-raiser, or from a public entity. Nor is the Court concerned about what their arrangements with the other individual, who comes forward after the award is made, might be." (App. A. infra, A2-A3 (emphasis added).)

Respondents subsequently filed a Motion for Order Confirming Satisfaction of Judgment in light of the fact that the City had tendered payment of both the compensatory and punitive damages portions of the

remittitur on behalf of Crawford and the four other officers.

At a hearing on September 26, 1988, Judge Fernandez provided for the separate payment of compensatory damages and punitive damages, together with interest. He ordered that if Petitioner refused to accept the payment of punitive damages "from defendants, CARMEN ANDRADE, JACKIE BELL, RICHARD BRADLEY, GARY CRAWFORD, and BENJAMIN REISER (or from the city of Riverside or anyone else)" that a stay of execution against enforcement would take effect pending an appeal. (App. C to Petition, 10a.)

On October 7, 1988 counsel for Respondents presented Mr. Yagman with two checks drawn on the client trust account of the law firm of Roberts & Morgan (trial counsel of record for Respondents). The checks represented separate payment of the compensatory damages with interest, and

punitive damages with interest. Yagman refused to accept the check representing the separate payment of punitive damages with interest. (Supp. R. 17-21.) Acknowledgement of the satisfaction of the compensatory damages and interest portion of the judgment was filed October 13, 1988. An appeal to the Ninth Circuit followed.

In her briefs submitted to the Ninth Circuit, Petitioner argued that she has a "right" to insist upon payment of punitive damages from the individual officers, and further that the "entire purpose of assessment of punitive damages would be thwarted by permitting the government to pay [them]." Petitioner relied exclusively on excerpts from the United States Supreme Court's decision in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) to support her contention that the "federal common law of punitive damages" requires an individual against whom

punitive damages are assessed to pay those damages out of his own pocket.

The Ninth Circuit rejected Petitioner's arguments, and also rejected a petition for rehearing and for hearing en banc. (Copies of the Ninth Circuit's opinions are attached as Appendices A and B to the Petition.)

Finally, after the parties had briefed the matter before the Ninth Circuit but before its decision was issued, Petitioner accepted payment of the punitive damage awards against officers Carmen Andrade, Jackie Bell, Richard Bradley and Benjamin Reiser from the City of Riverside. Petitioner still refused, however, to accept payment of the remaining $4,000 assessed against officer Gary Crawford from the City. It is that portion of the judgment below, and that portion alone, which is the subject of this Petition.

IV.

REASONS WHY THE PETITION SHOULD BE DENIED

Despite Petitioner's mischaracterizations to the contrary, the legal arguments contained in the Petition are based almost exclusively on language drawn out of context from the Court's decision in City of Newport v. Fact Concerts, 453 U.S. 274, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981).[3/]

[3/] The only other authorities which Petitioner cites as support for the claim that a "federal common law of punitive damages" exists and prohibits indemnity for punitive damages are Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), and a jury instruction from Devitt & Blackmar.

Owen concerned the question of whether a municipal defendant in a Section 1983 case is entitled to the defense of qualified immunity. The portion of the decision to which Petitioner refers concerned the Court's view of the purpose of Section 1983 claims in general. In fact, Petitioner misquotes the excerpt, and omits language which shows that the Court was specifically considering the liability of public agency defendants. See Owen, 445 U.S. at 651-652.

With respect to the jury instruction, the current volume of Devitt & Blackmar contains, at Section 85.11, an instruction on the present worth of future loss. It has

Petitioner claims that the decision of the Ninth Circuit below is "glib" and is based upon the "panel's author's antipathy to civil rights plaintiffs." (Petition, p. 15.)

The basic premise of Petitioner's argument is that this Court somehow concluded in Fact Concerts that an individual who has had a punitive damages award assessed against him under 42 U.S.C. Section 1983 cannot have that award paid for him by his public agency employer if the agency so chooses. As explained below, Petitioner's argument is entirely without foundation. The decisions of the Ninth Circuit and the trial court below in this case are correct and are not "at odds" with federal law. They are, in fact, entirely consistent with principles of comity and federalism.

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nothing to do with punitive damages. In any event, a proposed jury instruction is not very persuasive on the question of the scope of federal law -- especially when Petitioner mis-cites it and fails to cite to the underlying authority for the instruction.

Petitioner's "policy" arguments are also without merit. As the courts in this case below have found, punitive damage awards do not necessarily lose their effectiveness if an individual reaches some arrangement to have the award paid on his behalf. What is more, the actions of Petitioner's own counsel in connection with the judgment in this case indicate that Petitioner is not so much concerned with abstract policy considerations as with exacting as high a payment as possible from Respondents.

A. There Is No Federal "Common Law" Rule Concerning Punitive Damages Which Requires Preemption Of The Indemnity Provisions of California Government Code Section 825(b) And Thus Prevents A Public Agency From Paying Such An Award For The Individual.

Respondents respectfully submit that the main argument in the Petition consists of a "house of cards." Petitioner's assertion that she is legally entitled to prevent a public agency from paying a punitive damages award on an individual's behalf is based upon the assumption that there is some body of law, known as the "federal law of punitive damages," which requires that one who has a punitive damages award assessed against him must pay that award out of his own pocket. This "federal law of punitive damages", as Petitioner calls

it, is in turn purportedly based upon certain statements made by this Court in the Fact Concerts case, and what Petitioner calls basic "principles of retribution." Thus, Petitioner asserts, the courts in this case below have engaged in a "faulty construction of federal law," and have decided this case "at odds with previous assumptions." (Petition, p. 7.) Indeed, the only "assumptions" which are involved here are Petitioner's, and they are without merit.

Petitioner has not asserted, and cannot assert, that Congress intended to "occupy the field" with respect to civil right claims (and attendant procedural matters) when it enacted the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Petitioner instead claims that there is a direct conflict between California Government Code Section 825(b) and Section 1983.

Petitioner sees the source of this purported conflict in language from the Court's decision in Fact Concerts, and she cites excerpts from it extensively in her Petition. (Petition, pp. 8-11.) She then sums up her "discussion" with the following conclusion, which consists mostly of quotations taken out of context from the Fact Concerts opinion:

> "This Court unequivocally has declared that the malice of individual government officials 'should not be attributed to the taxpaying citizens of the community' and that a municipality cannot 'be responsible for the malice of its officers.' 'Punishment properly [can be] applied only to the actual wrongdoers.' 'Retribution should [not] be visited upon the shoulders of blameless or

unknowing taxpayers.'" (Petition, p. 11.)

The Court's decision in Fact Concerts was rendered in a context significantly different from this case. In Fact Concerts, this Court ruled that municipalities are immune from the assessment of punitive damages under 42 U.S.C. Section 1983. The case involved a civil rights claim by concert promoters that the City of Newport, Rhode Island and its officials violated their rights to freedom of expression when the City cancelled the concert organization's license. The trial judge instructed the jury that it could award compensatory and punitive damages against all defendants, including the municipality.

This Court reviewed the question and concluded that, in enacting Section 1983 in 1871, Congress did not intend to abrogate the pre-existing common law principle that a

municipality is immune from exemplary damages. Fact Concerts, 453 U.S. at 258-266. The Court went on to consider whether public policy dictates that Section 1983 should be construed differently than these common law principles of immunity. Id. at 266-271. The Court concluded that the common law immunity afforded to municipalities should remain in force, and that neither Section 1983 nor public policy concerns should change that result. Id. at 271.

In footnote 30 of its opinion, the Court noted that several state statutes relating to indemnity of municipal employees "specifically exclude indemnification for malicious or willful misconduct." The Court cited rules from five states, including Section 825 of the California Government Code (prior to its amendment in 1985 which added subsection (b) concerning punitive damages). Id. at 269, footnote 30.

Petitioner and her counsel have attempted to stretch the application of the Fact Concerts decision from one where a municipality is rendered immune from involuntary assessments of exemplary damages, to a ruling that a municipality is prevented from choosing to indemnify certain officers or employees pursuant to state statute.

This Court only ruled in Fact Concerts that Section 1983 cannot involuntarily expose municipalities to liability for exemplary damages in contravention of the common law rule. The question of voluntary indemnification of an individual employee by a municipality was clearly not before the Court, and no tortured reading of the decision by Petitioner and her counsel can make it so. The fact that the Court reaffirmed municipal immunity from exemplary damages clearly does not mean that state statutes relating to indemnity are prohibited by, or conflict with, the Fact Concerts

decision or any purported "federal law of punitive damages" stated therein.[4/]

In addition, as evidenced by footnote 30 of the opinion, the Court was aware that only a few states had indemnity provisions which actually prevent a public agency from indemnifying a public officer for judgments for exemplary damages. The Court made no ruling whatsoever that the remaining statutes which permit such indemnification conflict with Section 1983. To the contrary, the fact that the Court acknowledged them without extending its ruling indicates that it did not consider a conflict to exist.[5/]

[4/] In this regard, Petitioner's citation to Guillory v. County of Orange, 731 F.2d 1379 (9th Cir. 1984) and Martinez v. California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980) are misplaced. Those cases dealt with actual immunity from liability, not with indemnity.

[5/] Petitioner may argue that the Court impliedly approved of those statutes which exclude indemnification for punitive damages because it mentioned in footnote 30 that some commentators approved of such an exclusion. This clearly does not mean, however, that the federal civil rights law conflicts with the

Two other federal courts have rendered decisions which are consistent with this interpretation of the scope of the Fact Concerts opinion and footnote 30. In Bell v. City of Milwaukee, 746 F. 2d 1205 (7th Cir. 1984), the Seventh Circuit considered, inter alia, the relationship between a Wisconsin law which required indemnification of public officials and Section 1983. The City of Milwaukee argued, as Petitioner argues here, that the Court's decision in Fact Concerts overrode the state statute. Id. at 1271. Thus, the city asserted, it was not required to pay the judgments assessed against the individual defendants. Id.

The Seventh Circuit rejected the city's argument. It noted that, in footnote 30 of the Fact Concerts opinion, the Supreme Court recognized the existence of such indemnity for punitive liability, and further

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remaining statutes, or are otherwise improper.

impliedly recognized that a public agency may, because of the effect of state law, ultimately pay a punitive damage award assessed against its employees. Bell, 746 F. 2d at 1271.

In Haile v. Village of Sag Harbor, 639 F. Supp. 718 (E.D.N.Y. 1986), the plaintiff brought, inter alia, Section 1983 claims against the Village of Sag Harbor, the Town of Southampton, and several of its police officers for excessive force. The plaintiff sought punitive damages from the police officers. Relying on Fact Concerts, Southampton argued that the claims for punitive damages should be dismissed because New York law required an agency to indemnify its officers, and Southampton was thus, in effect, the real party in interest. Id. at 723.

The Haile court rejected the argument:

> "This result is wholly unjustified. The Supreme Court in [Fact Concerts] held simply as a matter of statutory construction that the Congress which enacted the original civil rights statute did not intend to create a punitive damages remedy against municipalities . . . To accept defendants' argument would require the Court to misread [Fact Concerts], which expressed no view on the allocation of liability under state law . . ." Id. at 723-724.

The Ninth Circuit Court of Appeals and the California Supreme Court have considered the general relationship between California Government Code Section 825 and federal law, and have failed to find preemption. In Demery v. Kupperman, 735 F. 2d

1139 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985), the Ninth Circuit ruled that the general indemnity principles of Section 825 do not mean that a judgment against a state employee violates Eleventh Amendment principles of sovereign immunity. The court stated that "California's obligation [under Section 825] to pay the damages awarded against its employees derives from an entirely collateral and voluntary undertaking on the part of the state." Id. at 1148-1149.

In Williams v. Horvath, 16 Cal. 3d 834, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976), the California Supreme Court ruled that at least the pre-amendment indemnification provisions of California Government Code Section 825 apply to actions brought under the Civil Rights Act of 1871. The State Supreme Court ruled, inter alia, that nothing in the federal authorities indicates that local agencies are precluded from

providing indemnity to its employees in a Section 1983 action. Id. at 844. While the Williams decision was rendered before the 1985 amendment to Section 825 which added subsection (b) relating to punitive damages, the California Supreme Court implicitly noted in Williams that, upon proper statutory authorization, a local agency could indemnify an officer for punitive damages:

> "[I]t is suggested that police officers, like other officials, at times may abuse their authority, and the law demands they be held to answer for any wrong so committed. Thus it may be argued that to permit indemnification would remove an effective deterrent to illegal police conduct -- the potential of personal liability. But in truly egregious cases the indemnification statues expressly forbid reimbursement by the entity, and indemni-

fication without authorization would be open to a charge of unlawful gift of public funds. Secondly, the indemnification provisions in effect facilitate the bringing of actions against erring public servants, because the plaintiff is assured that the financial resources of the entity will stand behind the judgment. Thirdly, we might also reasonably surmise that indirect entity liability through indemnification will cause the entity to exercise an additional degree of caution in the hiring and supervision of employees whose functions carry a greater risk of potential liability.

"Accordingly, we conclude that the indemnification provisions remain applicable whether the action is grounded on the Tort Claims Act or on

Section 1983." Id. at p. 848 (footnote omitted).

Because there is no real federal pronouncement, as Petitioner advocates, which preempts a state's right to enact indemnification legislation, Petitioner's discussion of the preclusive effect of 42 U.S.C. Section 1988 is meaningless. This is because Section 1988 only operates to nullify state law if there is some actual conflict or inconsistency between state and federal law. See Board of Regents v. Tomanio, 446 U.S. 478, 485, 100 S. Ct. 1790, 64 L. Ed. 2d 440 (1980).[6/] Moreover, Petitioner's discussion

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[6/] For example, in Robertson v. Wegmann, 436 U.S. 584, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978), the Court considered whether Louisiana survivorship law applied in a Section 1983 claim asserted on behalf of a deceased plaintiff by his executor. The Court ruled that the Louisiana rule was not inconsistent with federal law. Id. at 593 and fn. 11. Similarly, in La Raza Unida v. Volpe, 545 F. Supp. 36 (N.D. Cal. 1982), the Ninth Circuit concluded that a California requirement for a legislative appropriation to pay court-awarded attorney's fees directly conflicted with the attorney's fees provisions of Section 1988. Id. at 38-39.

of the application of Section 1988 presumes, without any legal support, that state principles of indemnity are to be equated with other, substantive state rules or with certain remedies which may or may not be available under Section 1983.[1/] The mere availability of state indemnity provisions in a Section 1983 case, in the absence of some actual conflict with Section 1983, is insufficient to invoke the preclusive provisions of Section 1988. The availability of governmental indemnification of officials under state law does not "nullify" a judgment or remedy under Section 1983, nor does it affect

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[1/] Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), Brazier v. Cherry, 293 F.2d 401 (5th Cir.) cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed. 2d 136 (1961), Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), and Smith v. Wade, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983), all discussed the application of Section 1988 in terms of the availability of particular remedies. Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), dealt with the appropriate period of limitations.

or impair a plaintiff's substantive rights under Section 1983.

Petitioner has tried to characterize this case as involving a direct conflict between state indemnity statutes and Section 1983 such that preemption principles and the preclusive terms of Section 1988 apply. As the foregoing discussion points out, however, a public agency's decision to invoke the indemnity provisions of California Government Code Section 825(b) is a matter which is entirely separate and distinct from the fact of the punitive damages judgment itself. Under such circumstances, principles of comity and federalism dictate that the federal courts should not needlessly encroach upon the authority of the states to authorize such "collateral and voluntary" action. See Demery, 735 F.2d at 1149; see also Molina v. Richardson, 578 F.2d 846, 852 (9th Cir.) cert. denied, 439 U.S. 1048, 99 S. Ct. 724, 58 L.Ed. 2d 707 (1978)(California indemnity

statutes, when applied to Section 1983 claims in federal courts, "at once serve the interests of federalism and general constitutional values").

B. Petitioner's Assertion That Preemption of California Government Code Section 825(b) Is Further Mandated by Policy Considerations Is Based Upon a Narrow View of the Purpose and Effect of Punitive Damages Awards.

Petitioner also asserts that Section 825(b) should be preempted because "the purposes of assessment of punitive damages in civil rights actions do not permit such burden-shifting" and because "traditional notions of punishment and responsibility do not permit" it. (Petition, p. 11.) These policy arguments do not add anything to the Petition.

Petitioner essentially claims that once an individual defendant in a Section 1983 claim is indemnified by his agency for punitive damages, that judgment loses most or all of its effectiveness as punishment or deterrence. As noted by Judge Fernandez below, however, the same could be said about compensatory damage awards for which there is insurance coverage. What is more, an award of punitive damages against an agency's employee does not necessarily lose its impact on that employee even if he does not pay it -- the mere fact that such a judgment is entered may be punishment enough -- and it certainly will not lose its effectiveness as a "standing warning" to others, as Judge Fernandez put it. (App. A, infra, A2.) This is especially so with respect to Section 825(b) because the employee does not have an unqualified right to have the judgment paid for him. The agency must voluntarily decide to authorize the payment, which, as Judge

Fernandez recognized, it may not always decide to do for political or other reasons. (See App. A, infra, A2; see also Williams v. Horvath, 16 Cal. 3d 834, 848, 129 Cal. Rptr. 453, 548 P. 2d 1125 (1976).)

What is more, Petitioner's policy argument that a punitive damage award must be paid by the individual defendant would also mean that payment could not come from any other source, such as a private foundation, an employees' association, or even a friend or relative. (See App. A, infra, A3.) This absurd and unnecessary result further exposes the untenable nature of Petitioner's argument. This Court and the lower federal courts should not, and clearly need not, become involved in supervising the source of payment of damages awards under Section 1983.

Finally, the so-called policy arguments which Petitioner's counsel so vigorously asserts cannot be too important,

because Petitioner herself was willing at one point to even accept payment of the punitive damages award from the City itself provided the payment was sufficiently high. And, even after the remittitur was issued and while this case was before the Ninth Circuit Petitioner did, in fact, accept payment of the amounts in the remittitur from the City on behalf of all but one officer.

V.

CONCLUSION

For the foregoing reasons Respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FETUS CORNWELL, et al., Plaintiffs,	) CV 86-3107 FFF)) ORDER REGARDING) RECONSIDERATION vs.) OF REMITTITUR ORDER)
CITY OF RIVERSIDE, et al., Defendants.	) (Filed July 22, 1990))))

The Court has reviewed the plaintiff's Request for Order Shortening Time, and has also reviewed the proposed motion for which the Order Shortening Time is requested.

The Court will grand the Application for Order Shortening Time, but, pursuant to its discretion under Fed. R. Civ. P. 78 and Local Rule 7.11, will order the matter submitted at this time without oral argument. The Court will now rule, since further briefing would be fruitless.

As the Court has previously indicated, the punitive damages in this matter were levied against the officers for their actions. The Court deemed those damages appropriate, without consideration of the individual's own assets -- a matter not in evidence. The Court was, and is, of the opinion that such an award levied against the officers personally would not only underscore the impropriety of their actions for them, but would also be a standing warning to all others regarding such actions.

The Court does not accept the plaintiff's major premise that the award here loses most of its value if the officer does not pay it.

First, the same could be said about compensatory damage awards, particularly when there is insurance. However, those of us who are involved in the legal system know that ordinary people feel very strongly about being accused of wrongdoing and found responsible for others' injuries, even when

there is insurance to cover the damages awarded.

Secondly, the award is against the individuals and they have no right to be paid by the City or anyone else, and that must be, and remain, a concern of theirs. California Government Code Section 825(b) does not require payment by the City. Rather, the governing body must make a decision regarding the particular case before payment is authorized.

Third, it can be expected that no public entity likes paying out money, and police officers, and others, must be aware of that fact, and must be aware of the possible political repercussions of authorizing the payment of punitive damage awards.

In any event, the Court does not believe that it should be concerned about where the defendants ultimately obtain the money to pay any awards against them, be it from their own assets, from a relative, from an association, from a fundraiser, or from a

public entity. Nor is the Court concerned about what their arrangements with the other individual, who comes forward after the award is made, might be.

IT IS THEREFORE ORDERED that the Application for the Order Shortening Time is GRANTED, the matter stands submitted, and the motion is DENIED.

DATED: July 22, 1988

/s/ Ferdinand F. Fernandez
FERDINAND F. FERNANDEZ
United States District Judge

APPENDIX B

CALIFORNIA GOVERNMENT CODE

"§ 825. Defense by public entity; payment of judgment, compromise or settlement; punitive damages; memorandum of understanding

"(a) If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise

or settlement of the claim or action to which the public entity has agreed.

"If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established

that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

"Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

"(b) Notwithstanding subdivision (a) or any other provision of law, a public entity, other than the state as defined in Section 900.6, is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:

"(1) The judgment is based on an act or omission of an employee or former employee acting within

the course and scope of his or her employment as an employee of the public entity.

"(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

"(3) Payment of the claim or judgment would be in the best interests of the public entity.

"The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

"The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

"(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become

effective unless approved by the Legislature in the annual Budget Act.

"(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or pursuant to any other law or authority.

"(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 or Title 42 of the United States Code." (West Supp. 1990).